IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 156 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-
and
HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

STAR STEEL PVT.LTD.

Appearance:

1. INCOME TAX REFERENCE No. 156 of 1991
MR MANISH R BHATT for Petitioner No. 1
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.H.WAGHELA
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 04/09/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. This is a reference at the instance of the

Commissioner of Income Tax and the following question of law has been referred to us by the Income Tax Appellate Tribunal, Ahmedabad Bench 'B' under Section 256(1) of the Income Tax Act, 1961 (for short 'the Act') :

"Whether, the Appellate Tribunal is right in law and on facts in setting aside the order passed by the I.T.O. under Section 155(4A) whereby the investment allowance allowed at the time of the original assessment stood withdrawn ?".

2. The assessee is a Private Limited Company and for Assessment Year 1977-78 it was allowed investment allowance of Rs.56,716/= on an item of Plant & Machinery known as "Reduction Gear Box". During the accounting period relevant to Assessment Year 1981-82 the said Plant & Machinery was scrapped since it was not functioning efficiently resulting in frequent stoppages of production. In light of this accepted position, the Assessing Officer issued notice indicating intention to rectify under Section 155(4A) of the Act. The assessee resisted the proposed action. However, according to the Assessing Officer, in light of the definition of "transfer" within the meaning of Section 2(47) of the Act, there was extinguishment of rights of the assessee and hence, the condition of the Plant & Machinery being "otherwise transferred" is satisfied. Therefore, according to the Assessing Officer, the investment allowance of Rs.56,716/= granted during Assessment Year 1977-78 was required to be withdrawn. The assessee failed in its appeal before the C.I.T. (Appeals). However, the Income Tax Appellate Tribunal accepted the contention of the assessee that the assessee had not transferred the Plant & Machinery but steel which was converted from scrap of the defective Plant & Machinery.

3. Heard Mr.M.R.Bhatt, learned Sr. Standing counsel appearing on behalf of the applicant - revenue. Though served there is no appearance on behalf of the respondent.

4. It was contended by Mr.Bhatt that Section 155(4A) specifically lays down that if at any time before the expiry of eight years from the end of the previous year in which Plant & Machinery was installed, the Plant & Machinery was sold or otherwise transferred, the investment allowance originally granted shall be deemed to have been wrongly allowed and the Assessing Officer was, therefore, right in passing the necessary order recomputing the total income by withdrawing such investment allowance. It was submitted that the term

"otherwise transferred" would take within its sweep not only the original Plant & Machinery but also any other item which would be obtained on conversion of the original Plant & Machinery. Mr.Bhatt also, at the same time, invited our attention to the fact that before the Tribunal reliance was placed on decision of this Court in case of COMMISSIONER OF INCOME-TAX, GUJARAT-II VS. VANIA SILK MILLS (P) LTD., (1977) 107 I.T.R. 300, but the said decision has subsequently been reversed by the Supreme Court in the case of VANIA SILK MILLS P. LTD. Vs. COMMISSIONER OF INCOME-TAX, (1991) 191 I.T.R. 647. It was also submitted that the Apex Court has reiterated the same position of law once again in the case of MARYBONG AND KYEL TEA INDUSTRIES LTD. Vs. COMMISSIONER OF INCOME TAX, (1997) 224 I.T.R. 589.

5. It is an admitted position that in this case what has happened is that the asset in question was scrapped and the scrap was utilized as raw material for the manufacture of steel and the steel was subsequently sold. In light of this peculiar factual position the Tribunal was right in law in holding that neither machinery nor plant on which investment allowance had been granted was sold or otherwise transferred. The contention on behalf of the revenue that the term otherwise transferred would take within its sweep any other converted form of asset cannot be accepted in light of the clear and unambiguous language employed in Section 155(4A)(a) of the Act.

6. In case of VANIA SILK MILLS P. LTD. Vs. COMMISSIONER OF INCOME-TAX (supra) the Apex Court has stated that in light of the various words and expressions used in the definition of "transfer" in Section 2(47) of the Act the existence of the asset is a sine qua non before it could be stated that the asset was transferred. It was further laid down that when an asset is destroyed, there is no question of transferring it to others.

7. Applying the aforesaid ratio to the facts of the case it is apparent that the Plant & Machinery on which investment allowance was granted was not in existence and what was sold was steel recovered from the scrap of Plant & Machinery. Hence, in absence of the Plant & Machinery, there is no question of application of Section 155 (4A)(a) of the Act.

8. In the result, we hold that the Tribunal was right in law in holding that the Assessing Officer could not have invoked Section 155(4A)(a) of the Act so as to withdraw investment allowance allowed at the time of original assessment.

9. The question referred to us is, therefore, answered in the affirmative i.e. in favour of the assessee and against the revenue.

10. This reference is disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-

[D.H.WAGHELA,J] [D.A.MEHTA, J]

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'Bhavesh'